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Libyan Nationalization of British Petroleum Company Assets

On December 7, 1971, the Government of Libya announced on the Tripoli radio that it had nationalized the assets of the British Petroleum Exploration (Libya) Ltd. in retaliation for Great Britain's failure to prevent Iranian occupation of Arab islands in the Persian Gulf. It was stated that, in accordance with a law enacted by the Government's Revolutionary Council on the same day, a Committee had been set up to assess "fair and adequate compensation within three months." It was also stated that a new company called the Arabian Gulf Petroleum Company would take over all assets and operations of BP in Libya.[1]

At this writing, this is the latest of a long series of nationalizations of foreign-owned companies in developing countries.[2] It is unique, however, in having as its motivation, not injury to Libya itself or to any of its nationals, but acquiescence by the British Government in military action in a region far beyond the territory of Libya by the government of a third country, namely, Iran.

No doubt, the Libyan Government considered its action justified as a measure evidencing its solidarity with the Arab bloc, but it is difficult to perceive in this any genuine "public purpose" as required by international law.[3] Moreover, the action was unqualifiedly discriminatory, in that only

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[1]The Times (London), Dec. 8, 9, and 24, 1971.

[2]*Nationalization, Expropriation, and Other Takings of United States and Certain Foreign Property since 1960*, U.S. Dept. of State, Bureau of Intelligence and Research Study RECS-14, Nov. 30, 1971; *see* INT. LEGAL MAT., Vol. XI, No. 1, Jan. 1972, at 84.

[3]At the U.N. Security Council on December 9, 1971, the representative of Libya asserted that Great Britain had "violated the treaties that it had itself imposed on the Sheikhdoms of the Arabian Gulf." His government, "an Arab Government," had "replied in the only way understood by the imperialists – by nationalizing the oil interests of Great Britain in the Libyan Arab Republic and withdrawing our deposits from British banks." (U.N. Sec. Council, Prov. Verbatim Rec., S/PV.1610, 9 Dec. 1971, at 96). Claiming that "the United Nations lends a deaf ear to the loud cries of the small and weak while it listens attentively and obediently to the words and whispers of the big Powers," he said that the "small States of the Third World should therefore unify their efforts," that "the imperialists understand only the language of their own self-interest," and that "they must be hit where it counts instead of only

British-owned assets were singled out for expropriation, and then only the assets of a single British-owned company. The United States partner of BP in the Sarir field was not touched.[4]

Reaction by the British Government was immediate and robust. Although it was initially stated in the House of Commons that "we have never said that it is our view that countries are not entitled to nationalize . . . we do expect prompt and adequate compensation when that occurs,"[5] the official protest was reported to have characterized the taking as "illegal and invalid" because of its discriminatory and arbitrary nature and because it was carried out for political purposes.[6] In fact, as one expert later stated, for a State to discriminate against the nationals of another State because of a policy followed by the latter's government is "simply an act of spite, which cannot be regarded as fulfilling a public purpose."[7]

The nationalization provoked some interesting and significant correspondence in the London *Times*. A Dr. Musa Mazzawi, writing from the Law Department of the Polytechnic of Central London, stressed that there is abundant authority for the view that "governments are entitled freely to nationalize the property of aliens so long as adequate compensation is offered and promptly paid." In support of this, he referred to the Note from the United States Secretary of State to the Mexican Government of July 21, 1938, regarding compensation for American-owned lands expropriated by the Mexican Government. That Note, he said, admitted "the right of all countries freely to determine their own social, agrarian, and industrial problems," including "the sovereign right of any government to expropriate private property within (its) borders in furtherance of public purposes. . . ."[8]

There was also English judicial and academic authority, he said, for the view that "agreements between a government and individuals, such as

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complaining to the Security Council" (*ibid.*). The matter before the Security Council was the occupation by Iran of the Tunb Islands at the mouth of the Persian Gulf. Asserting that these islands belonged to Ras al Khaima, part of the United Arab Emirates, which was admitted as a U.N. member on the same day (Dec. 9, 1971), Algeria, Iraq, Libya and Yemen denounced the Iranian occupation as "blatant aggression . . . against all the Arab people. . . ." The British were attacked for "pulling out" and leaving the field open to Iran, when they were bound by treaties "to defend the territorial integrity of the Emirates" (*id.*, at 21, 22, 57).

[4]Bunker Hunt. Until nationalization, the field had been operated by BP, production being "almost evenly split between the two companies." The Times (London), Dec. 9, 1971, and Jan. 6, 1972.

[5]Hansard, House of Commons, 8 Dec. 1971, col. 1300.

[6]The Times (London), Dec. 24, 1971; Financial Times, Dec. 24, 1971.

[7]Michael Akehurst, Senior Lecturer in Law, University of Keele, The Times (London), Jan. 14, 1972.

[8]The Times (London), Jan. 3, 1972. The passage from the U.S. Note to Mexico of July 21, 1938, is quoted in BRIGGS, THE LAW OF NATIONS (2d ed.), at 556.

grants of concessions, are terminable at the discretion of governments on the ground that a government cannot in law fetter its discretion to protect the interests of its people at all times and to disregard 'obligations' the fulfilment of which would harm the interests of the people."

A government, he continued, is "considered to be the best, and only judge of the interests of its people," and it was "presumptuous, and inadmissible in law, for the government of another country to claim that it knows best what the interests of the peoples of other countries demand." This proposition, he said, has been upheld in many cases, the most recent illustration being the decision of the United States Supreme Court in the *Sabbatino* case.

Accordingly, the only question at issue in the Libyan nationalization, he concluded, should be the measure of compensation. The motive for nationalization was "utterly irrelevant." The British Government protest based on alleged violations of international law was not, he suggested, likely to promote respect for international law or its practitioners if it went unchallenged.[9]

These views were challenged by the *Times* itself in a leading article (editorial) in which it was pointed out that the Libyan Government "expressly admitted" that the nationalization was carried out "in retaliation for Britain's alleged failure to prevent the Iranian occupation of the Tunb Islands in the Persian Gulf." As for compensation, the appointment of an assessment committee was "hardly reassuring." Not surprisingly, perhaps, the British Government did not feel that the test of "prompt, adequate and effective compensation" had been satisfactorily met. There appeared to be, therefore, strong support for the view that the nationalization was "illegal and invalid."[10]

In letters to the *Times,* international law experts confirmed these views. Frank Griffith Dawson stressed the discriminatory nature of the nation-

[9]*Id.* The case referred to is Sabbatino v. Banco Nacional de Cuba, 376 U.S. 398 (1964). The validity of the Libyan nationalization under international law was strongly supported by Dr. Muhamad A. Mughraby, of Beirut, former legal advisor to the Libyan Oil Ministry, in letters to the Middle East Economic Survey. In his view, the motives for the nationalization were control of national resources as well as retorsion for British Government acquiescence in the seizure of the Tunb Islands. Both, he contended, were justified under international law. A taking is not illegal in the absence of compensation, he said, pointing out that the United States put up an unsuccessful fight in the United Nations for "prompt, adequate and effective compensation." Nor could compensation be measured in terms of loss of revenue. And there is no duty not to discriminate in the absence of treaty stipulations. BP could not claim discrimination where many suffered from widespread economic and social reforms. Dr. Mughraby's views were vigorously rejected by Dr. Gillian White, of the Law Faculty of Manchester University in the same publication. *See* XV MIDDLE EAST ECONOMIC SURVEY, Nos. 12, 16, 17; Jan. 14, Feb. 11 and 18, 1972.

[10]*Libya's Weak Case in Law,* The Times (London), Jan. 4, 1972.

alization. Since 1765, he said, when Vattel published his celebrated "The Law of Nations," commentary and State practice have shown that a nation may not discriminate against the persons or property of aliens without incurring international responsibility.

Specific statements by Libyan Government spokesmen made it clear that the expropriation was in retaliation for the British Government's alleged posture, in events "totally unrelated to the conduct of BP under the concession agreement." Under international law, therefore, the illegality of Libya's behavior could be determined "without reference either to a lack of public purpose or to the principle of compensation."[11]

This was confirmed by Professor R. Y. Jennings of Cambridge, who said that "in a difficult and controversial area of law" the point that a "discriminatory expropriation is contrary to international law . . . is the one proposition upon which most authorities seem to have been able to agree." Nor could there be any possible question about the discriminatory purpose of the action taken, as the Libyan Government had proudly insisted on its purpose in a statement to the U.N. Security Council.

Professor Jennings also referred to Dr. Mazzawi's "anarchical and ultimately unworkable view that a government has in international law an absolute discretion at any time to break its own contract made with a foreign national. . . ." Even in English law, he said, this required qualification, and the situation in French law is quite different. The reference to *Sabbatino* was also misleading, as "the principle issue in that case was whether, under the constitutional law of the United States, it is the business of a domestic court to pass upon the legality or otherwise of the actions of a foreign government; or whether it is, as the court eventually held, a matter for the executive branch of government."[12]

On the matter of compensation, the London *Times* pointed out that not only were all the members of the committee appointed to value BP's assets Libyan, but also that there was no provision for consultation with BP and no details were available of what criteria would be used in the valuation. Moreover, it was stated that the decision of the committee would be final. The assets to be valued were not only "the hardware on the ground but the right to extract oil from the desert until 2011." There was a strong feeling in the industry, it added, that Libya would not recognize the rights of any oil company to anything but token compensation for the loss of long term production rights.[13]

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[11]The Times (London), Jan. 10, 1972.

[12]*Id.*, Jan. 17, 1972. As regards the reference to the U.N. Security Council, *see* Note 2, *supra*.

[13]*Oil's Angry Colonel*, The Times (London), Dec. 9, 1971.

It was later announced that the committee was composed of Ahmad Tashani, President, the head of the Tripoli Appeal Court; Mustafa Zaraiq, of the Treasury Ministry; and Seraj Omar Bugagis, of the Libyan National Oil Corporation.[14] Such a committee was considered by a Libyan supporter to be an appropriate means for determining "fair and adequate compensation." D. J. Appudurai went so far as to say that modern jurists, "among them Brownlie and Schwarzenberger," are of the opinion that "a state can nationalize without paying compensation provided it did so because of its own financial difficulties."[15] Both Brownlie and Schwarzenberger promptly repudiated any such view, the former saying that not only did no such opinion appear in any of his writings and was not held by him, but he supported generally the views expressed by Frank Griffith Dawson that "expropriation by way of political reprisal is unlawful whatever the position on compensation."[16]

Appropriately, the London *Times* asked what could be done. The British Government had made its protest, no reply had been received, and there appeared little else available at that stage. BP, however, had notified its customers that it would sue them if they bought what BP regarded as its oil from anyone other than itself.[17] In a letter to the Libyan Government, BP called for arbitration as required by its agreements with the Government. It appointed Professor Sir Humphrey Waldock, a leading international lawyer, as its arbitrator and demanded that the Libyan Government nominate one.[18] As no such nomination was made, BP has requested the President of the International Court of Justice to appoint an arbitrator on their behalf.

Following the procedures utilized nineteen years earlier in the case of the Iranian nationalization,[19] BP started detinue proceedings in January at

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[14]XV MIDDLE EAST ECONOMIC SURVEY, No. 17, 18 Feb. 1972, at 6. According to the nationalization law, the committee is to issue its decision within three months from the date of its formation, which appears to have been February 14, and to communicate this to BP within 30 days of its issue (*ibid.*).

[15]The Times (London), Jan. 10, 1972.

[16]*Id.*, Jan. 14, 1972. In the Times of January 17, 1972, Schwarzenberger referred to his treatise on Foreign Investments and International Law (London, 1969), in which he said, at page 4, that foreign-owned property may be appropriated in accordance with the minimum standard of international law "only in the public interest, without unjustifiable discrimination and on payment of full or adequate, prompt and effective compensation."

[17]*Libya's Weak Case in Law,* The Times, (London), Jan. 4, 1972. For BP's notice, *see* The Times, (London), Dec. 13, 1971.

[18]*Id.*, Dec. 13, 1971, at 15.

[19]Anglo-Iranian Oil Co. Ltd. v. Jaffrate and Others (The Rose Mary), 20 Int.L.Rep. 316 (Aden, Sup.Ct., Jan. 1953); Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R. Company (The Miriella), 22 Int.L.Rep.19 (Court of Venice, March 1953); *id.*, 22 Int.L.Rep.19 (Civil Court of Rome, Sept. 1953); Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha, 20 Int.L.Rep.305 (Tokyo, 1953).

Syracuse in Sicily to establish ownership of 37,000 tons of Libyan crude delivered at Priolo, north of Syracuse, to an Italian subsidiary of the Montecatini Edison Chemical Group.[20] Montedison disclaimed ownership of the crude, however, saying that it was part of a total quantity belonging to the Libyan Government, which Montedison had undertaken by an agreement concluded during the summer of 1971 to refine at its Sindcat refinery near Syracuse in Sicily. It was stated that the crude had not been purchased by Montedison but that it was "only in its tanks for processing."[21] As the *Times* editorial pointed out, an action such as this "might well take years to reach finality. . . ."[22] It is understood that the first hearing before the Italian court is not likely to be held before November, 1972.

This proceeding by BP, and threats of similar proceedings elsewhere, must constitute a real obstacle to the marketing of Libyan crude. In the case of the earlier actions taken following the Iranian nationalization, these did, as the *Times* observed, "have the effect of dissuading customers from disregarding the Anglo-Iranian Oil Company's warnings, couched in not dissimilar terms to that given by BP."[23]

There is also a report that the British Government itself formally approached the Governments of leading non-communist oil-consuming countries to warn them not to buy oil from BP properties seized by Libya. It was stated that these moves were made at "normal diplomatic level" and were "intended to help block Libyan attempts to market oil from the nationalized wells in the Sarir field." It was indicated that "reactions to the approaches had been favourable."[24]

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[20] *Id.*, Jan. 3, 1972. The oil was off-loaded from a Greek-owned, Panama flag tanker. An order was obtained directing the captain of the tanker to deliver copies of the ship's documents and samples of its oil cargo. XI INT.LEGAL MAT. 33 (March 1972). A BP spokesman said that it was up the the Syracuse court to establish whether the cargo had come from BP wells. The chemical composition of oil from the Sarir field was well known and, if the analysis proved this source, BP would proceed to establish ownership. The Times, (London), Jan. 3, 1972. The history of the BP/Hunt concessions, of the development of the Sarir field, and of the nationalization is set out in BP's Writ of Summons, a translation of which appears in XI INT.LEGAL MAT. at 335 (March 1972). A translation of the law nationalizing BP assets appears at page 380 of the same issue.

[21] The Times, (London), Jan. 5, 1972. SINCAT is an acronym for Societa Industriale Catanese.

[22] *Id.*, Jan. 4, 1972.

[23] *Id.* It is reported that the government had advertised in London and Beirut newspapers for supervisory staff to be hired on two-year contracts and that European brokers had been offered, and had refused, cargoes of crude believed to be from BP's share of Sarir production. 39 PET.PRESS SERV. 65 (Feb. 1972).

[24] *Id.*, Dec. 31, 1971. The same report stated that the Secretary General of the Organization of Petroleum Exporting Countries (OPEC) had said: "OPEC nations will certainly take counter measures if such a boycott is attempted."

At a time when international law is blandly ignored and distorted, such a boycott may be the only way of making long established principles effective, and for obtaining an impartial forum where claims can be adjudicated.